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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY DUANE LITTLE, Defendant and Appellant.	D071414 (Super. Ct. No. SCD268739)

APPEAL from a judgment of the Superior Court of San Diego County, Polly H. Shamoon, Judge. Affirmed in part and reversed in part with directions.

Kent D. Young, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

Anthony Duane Little pled guilty to possession of methamphetamine for sale (Health & Saf. Code, § 11378). He also admitted to a prior conviction of possessing drugs for sale (Health & Saf. Code, § 11370.2). Under the provisions of Penal Code section 1170, subdivision (h)(5)(B),[1] the trial court sentenced Little to a split sentence of six years, with three years in county jail followed by three years of mandatory supervision.

On appeal, Little challenges, as unconstitutional, conditions on his mandatory supervision under section 1170, subdivision (h)(5)(B), which require that he report any contact with law enforcement to his probation officer (condition No. 1j); submit computers and recordable media to search at any time when asked by his probation officer or a law enforcement officer (condition No. 1m); if directed by his probation officer, participate in GPS monitoring and comply with all zone and curfew restrictions (condition Nos. 1d, 8a & b); and obtain approval from his probation officer as to residence and employment (condition No. 7g). Little also contends the court erred by imposing a $1,500 restitution fine.

In the main, we find no errors in the conditions or fine imposed by the trial court. However, with respect to the requirement Little report contact with law enforcement officers, we remand with directions that the requirement be limited to contacts during which Little is asked to produce identification. In all other respects, we affirm.

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1 All statutory references are to the Penal Code unless otherwise specified.

FACTUAL AND PROCEDURAL BACKGROUND

On September 15, 2016, a police officer observed Little make three drug transactions. When he was contacted by law enforcement officers, Little was in possession of 4.25 grams of methamphetamine, 20 unopened packs of cigarettes, a few Xanax tablets, and two oxycodone tablets.

Little was arrested and pled guilty to possession of methamphetamine for sale and admitted one prior conviction of Health and Safety Code section 11370.2. The terms of the plea agreement included three years in county jail and three years of mandatory supervision under Penal Code section 1170, subdivision (h)(5)(B). The probation report prepared for sentencing recommended a restitution fine of $1,800 and several conditions of his mandatory supervision.

At Little's sentencing and following defense counsel's objection to the proposed restitution fine, the trial court imposed a restitution fine of $1,500. At sentencing, Little did not object to any of the conditions of his mandatory supervision proposed by the probation department and the trial court adopted them. Consistent with the parties' plea agreement, the trial court sentenced Little to a split sentence of six years, three years in county jail and three years of mandatory supervision.

DISCUSSION

I. *General Principles*

Conditions of mandatory supervision, like conditions of parole and probation must be reasonably related to the compelling state interest of fostering a law-abiding lifestyle in the released prisoner, parolee, or probationer. (See *In re Stevens* (2004) 119

Cal.App.4th 1228, 1234.) Thus, in most respects, cases which have considered probation conditions are helpful in determining the validity of conditions of mandatory supervision imposed under section 1170, subdivision (h). "Generally, '[a] condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." ' " (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*), quoting *People v. Lent* (1975) 15 Cal.3d 481, 486.) "This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*Olguin*, at p. 379.) Failure to raise the constitutionality of probation conditions does not forfeit the issue for review on appeal. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888–889; *People v. Quiroz* (2011) 199 Cal.App.4th 1123, 1127.) Importantly to avoid any vagueness, these conditions must provide an opportunity for "the probationer to know what is required of him, and for the court to determine whether the condition has been violated." (*In re Sheena K.*, at p. 890.)

Challenges on probation conditions are considered forfeited if not raised when they are imposed (*People v. Welch* (1993) 5 Cal.4th 228, 234–235), unless they are, as here, constitutional challenges presenting pure questions of law. (*In re Sheena K., supra,* 40 Cal.4th 875, 885.)

II. *Report of Contacts with Law Enforcement*

Little contends the condition requiring him to report any "contact" with law enforcement to his probation officer is unconstitutionally vague. We agree.

" '[T]he underpinning of a vagueness challenge is the due process concept of "fair warning." [Citation.] The rule of fair warning consists of "the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders" [citation], protections that are "embodied in the due process clauses of the federal and California Constitutions. [Citation.]" [Citation.] The vagueness doctrine bars enforcement of " 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' [Citations.]" (*People v. Relkin* (2016) 6 Cal.App.5th 1188, 1196–1197 (*Relkin*).) In *Relkin,* as here, a condition of probation required that the defendant report "any contacts with or incidents involving any peace officer." (*Id.* at p. 1196.) The court found the condition overbroad: "[T]he portion of the condition requiring that defendant report 'any contacts with . . . any peace officer' is vague and overbroad and does indeed leave one to guess what sorts of events and interactions qualify as reportable. We disagree with the People's argument that the condition is clearly not triggered when defendant says 'hello' to a police officer or attends an event at which police officers are present, but would be triggered if defendant were interviewed as a witness to a crime or if his 'lifestyle were such that he is present when criminal activity occurs.' The language does not delineate between such occurrences and thus casts an excessively broad net over what would otherwise be activity not worthy of reporting." (*Id.* at p. 1197.)

Plainly, the condition imposed on Little suffers from the defect identified in *Relkin*: by requiring that Little report any contact with law enforcement, it does not

differentiate between casual contact unrelated to any criminality, or even suspicion of criminality, and contact which might warrant some further investigation by a probation officer. Apparently recognizing the overbreadth of the condition, the Attorney General suggests that the condition be interpreted as only requiring that Little report contacts with law enforcement during which Little is asked to produce identification. We agree that such a limitation on the condition would cure its overbreadth defect by giving Little unambiguous guidance with respect to what events he must report and limiting his reporting obligation to those instances in which law enforcement officers are investigating possible criminality. However, rather than providing this limitation on the condition by way of interpretation in an appellate opinion, as a practical matter in order to fully protect Little's rights, this limitation on the condition should be expressly modified by the trial court. Accordingly, we will remand with directions that the condition be expressly modified.

III. *Search and Seizure*

The search and seizure condition imposed by the trial court requires Little to "[s]ubmit person, vehicle, residence, property, personal effects, computers, and recordable media _____ to search at any time with or without a warrant, and with or without reasonable cause, when required by P.O. or law enforcement officer." Little argues this condition is vague and constitutionally overbroad because it gives his probation officer the ability to "fill-in-the blank" with respect to recordable media; he also argues that in requiring that he submit his computers to warrantless searches, the trial court unnecessarily invaded his right to be free of unreasonable searches.

When defendants agree to serve a probationary sentence as a substitute to incarceration, "courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety . . . ." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120 (*Carbajal*); see *Olguin, supra,* 45 Cal.4th at p. 379.) The broad discretion granted to trial courts requires probation conditions to "serve a purpose specified in the statue," and are " 'reasonably related to the crime of which defendant was convicted or to future criminality.' " (*Carbajal,* at p. 1121.)

First, we note that by its express terms condition 1m requires that Little submit all his property, personal effects, computers, and recordable media to search; that description of what is subject to search is on its own broad enough to cover whatever is in Little's possession. In this context, the blank space in the form, rather than giving the probation officer any power to fill it in with some other device, location, or circumstance, appears to have been placed there by the drafters of the form so that the *trial court*, in a particular circumstance, may fill it in with a more specific description of what is subject to a search without a warrant at the time of sentencing. As interpreted in this manner, the blank space in the form provides Little's probation officer with no additional power to expand what is subject to search.

Second, we find no error in the condition insofar as it permits a warrantless search of Little's computer and electronic devices. Little's criminal history, dating back to 1995, includes numerous drug sale offenses, drug possession, and theft offenses, along with other assorted offenses. He has previously completed a rehabilitation program, but then relapsed. He is a lifelong drug addict who is also involved in drug sales. In *People v.*

Nachbar (2016) 3 Cal.App.5th 1122, 1129 (*Nachbar*), we approved a very similar condition of probation and stated: "As a defendant who has pleaded guilty to a felony and accepted probation in lieu of additional punishment, defendant has a diminished expectation of privacy as compared to law-abiding citizens or those subject to searches incident to arrest." With respect to Little's expectation of privacy, we find the reasoning in *Nachbar* persuasive.[2] Here, given Little's unfortunate history of drug use and drug trafficking, the condition is closely related to preventing future criminality and promoting his rehabilitation. Thus, we find no error in imposing it as a condition of his mandatory supervision.

IV. *Curfew and Electronic Monitoring*

Little contends the curfew and electronic monitoring condition the trial court imposed is unconstitutionally vague and overbroad because it impinges upon his constitutional right of intrastate travel and because it impermissibly delegates unlimited discretion to the probation officer. The condition requires him to participate in GPS monitoring, if requested by his probation officer, and comply with zone and curfew restrictions.

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2 In *Nachbar*, we expressly disagreed with the opinion in *People v. Appleton* (2016) 245 Cal.App.4th 717, 725 (*Appleton*), on which Little relies. (See *Nachbar, supra,* 3 Cal.App.5th at pp. 1128–1129.) In *Appleton,* the court held that given the breadth of information available on computers a warrant is required to conduct a search of a probationer's computer. (*Appleton*, at p. 725.) The Supreme Court granted review in *Nachbar,* pending its disposition of *In re Ricardo P.* (2015) 241 Cal.App.4th 676, which presents the issue of whether an electronics search probation condition may be imposed upon a juvenile when that condition has no relationship to the crimes committed. (*Nachbar*, S238210, Dec. 14, 2016.)

A probation condition may restrict the right to travel so long as it is " 'reasonably related to the compelling state interest in reformation and rehabilitation . . . .' " (*In re White* (1997) 97 Cal.App.3d 141, 146, quoting *People v. Mason* (1971) 5 Cal.3d 759, 768.) The curfew and GPS monitoring are reasonably related to aiding Little's rehabilitation by allowing probation officers to monitor his whereabouts and thereby ensuring his compliance with the other requirements of his mandatory supervision. Where, as here, a drug trafficker has been convicted of drug trafficking, the connection between preventing future criminality and the ability of a probation officer to monitor the defendant's whereabouts is self-evident.

V. *Residence and Employment Conditions*

Little objects to the conditions requiring him to obtain consent as to his residence and employment as unconstitutionally vague and overboard because the conditions are not tailored toward furthering a compelling state interest.

As we have noted, Little has a long history of drug abuse and has failed on multiple occasions to rehabilitate himself through various grants of probation supervision. In order to deter any future criminality, it is reasonable for a supervising probation officer to be aware of Little's associates and where he resides. (*People v. Stapleton* (2017) 9 Cal.App.5th 989, 995–996 (*Stapleton*).) In *Stapleton*, a residency condition was upheld because the condition aided probationer's rehabilitation. Similarly here, placing conditions on Little's residence and employment will allow probation officers to restrict him, for example, from living in a residence where drugs are sold or

used. Little's serious addiction to drugs, specifically methamphetamine, has shown the need for such a narrowly tailored condition.

The record here is in marked contrast to the one the court considered in *People v. Bauer* (1989) 211 Cal.App.3d 937, 944 (*Bauer*), upon which Little relies. In *Bauer,* the defendant was convicted of false imprisonment and assault and was placed on probation. One of the probation conditions was that he "obtain his probation officer's approval of his residence . . . ." (*Id.* at p. 940.) The defendant argued the condition was not related to his crime or rehabilitation and therefore unreasonably infringed on his constitutional rights of travel and association. (*Id.* at p. 944.) The court agreed, holding the defendant's home did not contribute to his crimes and gave the probation officer too much discretionary power over the defendant's living situation. (*Ibid.*) Here, in contrast, the probation condition giving the probation officer power over Little's residence and employment is closely related to the goal of preventing him from falling back into the drug use and distribution lifestyle which led to his current conviction.[3]

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3 As our discussion indicates, with the exception of the condition that he report his law enforcement contacts, we reject Little's contention the conditions he challenges are invalid. As we have noted, those conditions are related to his current and prior criminal history and contrary to his contention none of them, including a requirement that he participate in any validated assessment program required by the probation officer and any treatment suggested by that testing, amount to an improper delegation of authority to his probation officer. The challenged conditions are not open-ended and do not provide Little's probation officer with unfettered discretion as to their scope, but instead are details of supervision, which a court may properly leave to a probation officer's discretion. (See § 1202.8, subd. (a); *People v. Leon* (2010) 181 Cal.App.4th 943, 953–954.)

VI. *Restitution Fine*

Little argues the court improperly imposed a $1,500 restitution fine based on an inaccurate application of section 1202.4, subdivision (b). We find no error.

Section 1202.4, subdivision (b) provides: "(b) In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record.

"(1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense. If the person is convicted of a felony, the fine shall not be less than three hundred dollars ($300) and not more than ten thousand dollars ($10,000). If the person is convicted of a misdemeanor, the fine shall not be less than one hundred fifty dollars ($150) and not more than one thousand dollars ($1,000).

"(2) *In setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine pursuant to paragraph (1) multiplied by the number of years of imprisonment the defendant is ordered to serve*, multiplied by the number of felony counts of which the defendant is convicted." (Italics added.)

If a court decides to impose a fine greater than the $300 minimum fine, then the court "shall consider any relevant factors, including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered losses as a result of the crime, and the number

of victims involved in the crime . . . [a] defendant shall bear the burden of demonstrating his or her inability to pay. Express findings by the court as to the factors bearing on the amount of the fine shall not be required." (§ 1202.4, subd. (d).)

In the present case, the probation report recommended a restitution fine of $1,800 by using the formula in section 1202.4, subdivision (b)(2) and multiplying Little's six-year sentence by the minimum $300 restitution fine. Little contends that in making the calculation the probation department incorrectly used his total six-year sentence rather than the three years he will serve in local custody and that this calculation was implicitly adopted by the trial court in reducing the fine from $1,800 to $1,500.

Under the Criminal Justice Realignment Act of 2011 (Realignment), qualified defendants, such as Little, who are convicted of nonserious and nonviolent felonies are sentenced to county jail instead of state prison. (Stats. 2011, ch. 15, § 1; Stats. 2011, 1st Ex. Sess. 2011–2012, ch. 12, § 1; *People v. Scott* (2014) 58 Cal.4th 1415, 1418; *People v. Catalan* (2014) 228 Cal.App.4th 173.) In general, "[t]rial courts have discretion to commit the defendant to county jail for a full term in custody, or to impose a hybrid or split sentence consisting of county jail followed by a period of mandatory supervision." (*People v. Catalan*, at p. 178.)

The Legislature has made it clear that the mandatory supervision established by Realignment is to be treated as part of a defendant's prison term. (See *People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1422.) In *Fandinola*, the trial court imposed on the defendant, who was sentenced under section 1170, subdivision (h), a probation supervision fee under section 1203.1b, subdivision (a). On appeal, the court found that

the trial court erred because the mandatory supervision provided under section 1170, subdivision (h) is not a grant of probation or conditional release. The Court of Appeal rejected this argument and stated: "Section 1170, subdivision (h)(5)(B)(i), authorizes the trial court to suspend execution of a concluding portion of a defendant's term, 'during which time the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation,' but this does not mean placing a defendant on mandatory supervision is the equivalent of granting probation or giving a conditional sentence. Indeed, section 1170, subdivision (h) comes into play only after probation has been denied. (See *People v. Cruz* (2012) 207 Cal.App.4th 664, 671 ["once probation has been denied, felons who are eligible to be sentenced under realignment will serve their terms of imprisonment in local custody rather than state prison"].) Moreover, section 667.5 provides for a one-year enhancement for 'prior prison terms,' including a 'term imposed under the provisions of paragraph (5) of subdivision (h), of Section 1170, wherein a portion of the term is suspended by the court to allow mandatory supervision.' (§ 667.5, subd. (b).) Thus, the Legislature has decided a county jail commitment followed by mandatory supervision imposed under section 1170, subdivision (h), *is akin to a state prison commitment; it is not a grant of probation or a conditional sentence.*" (*Fandinola*, at p. 1422, italics added.)

Because mandatory supervision under section 1170, subdivision (h) is not a grant of probation or a conditional sentence, but akin to a prison term, neither the probation

department nor the trial court erred in using Little's full six-year sentence as the basis for calculating his restitution fine under section 1202.4.

DISPOSITION

The matter is remanded to the superior court with instructions to modify the mandatory supervision order to state that the "contact," which must be reported in accordance with condition No. 1j, is limited to instances in which law enforcement requests identification or personal identifying information from Little.

In all other respects, the judgment is affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.